IN THE

Supreme Court of the United States

October Term, 1932.

NO. 9.

LUTHER H. REICHELDERFER, HERBERT B. CROSBY AND JOHN C. GOTWALS, COMMISSIONERS OF THE DISTRICT OF COLUMBIA,

Petitioners,

vs.

HENRY I. QUINN, GEORGE J. MUELLER, JR., HENRY ORTH, JR., et al

Respondents.

On Writ of Certiorari to the Court of Appeals of the District of Columbia.

PETITION BY RESPONDENTS FOR RE-HEARING.

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PRESS OF THE SUDWARTH CO., WASHINGTON

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Come now Henry I. Quinn, and others, respondents herein, and respectfully petition the

Court to grant a re-hearing in the above case, which was decided December 5, 1932, the grounds therefor being:

1. The decision announced by the Court is based upon a new proposition not advanced by petitioners, and the cases cited by the Court in support thereof were not previously mentioned in the case, so that no opportunity has been afforded to discuss and analyze such cases.

2. Such new proposition has been the subject of conflicting decisions in different states for a long period, and, consequently, the ultimate pronouncement with respect thereto by the highest Court ought not to be made without an opportunity for full argument.

3. Such new proposition, as applied to this case, involves consequences which are opposed to prior decisions of this Court, as also to the precise provision in the Rock Creek Park Act declaring a perpetual dedication.

4. Should the Court re-affirm its decision, after respondents shall have been afforded an opportunity to argue such new proposition before the Court, the granting of an opportunity for such argument would not

> contravene, but be in accord with, the scrupulous regard which the Court has always shown for the rights of litigants before it.

Concisely stated, such new proposition is:

> That the right to discontinue, or change the use of, a particular public improvement, when betterments were by reason of it assessed, is as absolute as when no betterments were assessed, and regardless of whether the improvement be in its nature transitory or permanent, or was declared in the Act creating it to "be perpetually dedicated."

The authorities cited by the Court as supporting such proposition, and none of which were previously mentioned in the case, include: United States v. River Rogue Co., 269 U. S. 411; Thayer v. City of Boston, 206 Fed. 969; Stanwood v. Malden, 157 Mass. 17; Whitney v. New York, 96 N. Y. 240; Seattle Land etc. Co. v. Seattle, 37 Wash. 274; and 1 Nichols Eminent Domain (2d ed.) Sec. 116.

In United States v. River Rouge Co., 269 U. S. 411, supra, this Court Reversed the Circuit Court of Appeals for the Sixth Circuit for holding—

> That a riparian owner on the improved river would have merely such uncertain and

> contingent 'privileges' of access to the navigable stream and of constructing docks fronting on the harbor line, as the government, in the exercise of an absolute control over the navigation of the river, might see fit to allow him," (page 420).

and in so reversing said holding this Court quoted with approval from Yates v. Milwaukee, 10 Wall. 504, decided in 1870, as follows:

> "This riparian right is property and is valuable, and though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired.

So far from this Court holding, in either of those cases, that a diversion to a wholly different use could be justified without compensating a party previously assessed for betterments, it was distinctly held that anything later done even within the limits of the particular established use must exclude whatever would be arbitrary or capricious.

The case of Thayer v. City of Boston, 206 Fed. 969, supra, arose in Massachusetts in which State the rule had long been established by decisions of the State courts, that assessments for benefits conferred only a speculative right as to the future, in the absence of special terms and circumstances giving the parties assessed the right to understand that they were paying for something of a permanent nature. That case involved a public

park established without the use of any language declaring a perpetual dedication restricted to such use, and the Court in administering the Massachusetts law, as it was obliged to do in that case, said:

> "In the present case, there was no dedication of the park land, nor any acquisition of it by the city, upon a trust imposed by former owners. The plaintiff has, in the first place, to show that the assessments upon adjacent properties, including hers, were levied and paid *upon terms and under circumstances which fairly gave those assessed owners who paid them, or subsequent purchasers, the right to understand that they were then being assessed and were paying for nothing less than the perpetual maintenance of an adjacent park, consisting of the land acquired by the city as stated.*" (p. 973).

In Stanwood v. Malden, 157 Mass. 17, supra, the reason for the long established rule in Massachusetts was explained as follows:

> "It would have been intelligible for the legislature to say that, when a benefit is conferred upon a landowner, the value of which he does not pay for, he takes it upon the implied condition that he shall not be paid for it when it is taken away. *It will be remembered that there were no betterment laws when the meaning of this Act was settled.*" (pp. 18-19).

Obviously, no injustice has been done to anyone

in Massachusetts by the establishment and uniform recognition of the rule prevailing there, since betterment assessments have not extended beyond the rule, the condemnation juries being instructed that speculative rights only were conferred.

In Whitney v. New York, 96 N. Y. 240, supra, decided in 1884, a canal, after becoming obsolete and useless, was abandoned, and an adjoining owner sought damages. The Court said:

> "If it was given up as of no use, the owners of the land and their grantees had received all the advantages of the benefits to be derived from the taking of the land, as the determination of the appraisers evidences, and the presentation of an additional claim for damages at this late day rests upon no legal or equitable principles." (p. 246).
>
> "Nor is there any ground for the assumption that the canal appraisers, in fixing the amount of damages which the owners sustained, and in considering the probable benefits which might accrue by reason of the construction of the canal, based their estimate upon the theory that the canal was to be used and operated for all future time. It is a legitimate inference that they considered that the time which it might be used might depend upon unforeseen contingencies, and that in the progress of improvement the period might arrive when, as a means of transportation, the canal would be useless and of no account." (p. 245).

The limited holding in that case is further made

manifest by the subsequent decision of the same Court, in 1887, 3 years later, in Lahr v. Met. El. R. Co., 104 N. Y. 268, 290-1:

> "The claim made that the owner of property taken for a street obtains, through the award of the commissioners, full compensation for his property is unfounded, unless the benefits for which he is assessed, are *inviolably* secured to him by such proceedings. *Any other construction of the statute would render it an efficient engine of fraud and injustice.*"

Moreover, when in a still later case, Muhlker v. N. Y. & Harlem R. Co., 173 N. Y. 549, the Court of Appeals of New York sought to depart from the settled law in New York as laid down in Story v. N. Y. El. R. Co., 90 N. Y. 122, and Lahr v. Met. El. R. Co., supra, such attempt was set aside and held for naught by this Honorable Court, in Muhlker v. N. Y. & Harlem R. Co., 197 U. S. 544, in an opinion by Justice McKenna, stating:

> "When the plaintiff acquired his title those cases were the law of New York, and assured him that his easements of light and air were secured by contract as expressed in those cases, and could not be taken from him without payment of compensation." (p. 570).
>
> "We are not called upon to discuss the power, or the limitations upon the power, of the court of New York to declare rules of property or change or modify their decisions, but only to decide that such power cannot

be exercised to take away rights which have been acquired by contract and have come under the protection of the Constitution of the United States. And we determine for ourselves the existence and extent of such contract." (p. 570).

The case of Seattle Land etc. Co. v. Seattle, 37 Wash. 274, supra, is also *not* an authority in support of the proposition under discussion, but expressly recognizes the contrary rule, the Court saying:

"It is doubtless the law that, where a person dedicates or donates to a city a tract of land, with a restriction upon its use—as for instance, where it is so dedicated or donated solely for a park or a public street,—the city cannot legally divert the use of such property to uses and purposes inconsistent with the purpose of such grant; and, *in cases where a city acquiring property for the purpose of a public park, and the payment thereof is made by means of special assessments levied upon neighboring property specially benefited by reason of the acquiring and using of said property for such purpose, that the owners of said property, thus specially assessed, may in a proper case, prevent such property from being used in a manner that would destroy its use and enjoyment for the purposes for which it was acquired.*" (pp. 276-7).

In Vol. 1 Nichols, Eminent Domain, Sec. 116, supra, the author discusses quite clearly the rad-

ically differing rules prevailing in different States as to "Discontinuance or Change of Use when Betterments have been Assessed," and cites a number of cases in support of each rule, the text concluding as follows:

> "*The question has never been before the Supreme Court of the United States and the few states in which it has arisen are about evenly divided.* If the subject is one upon which a definite rule can be laid down, in deciding what that rule should be it is essential to note the distinction between an assessment for the establishment of a public improvement and an assessment for the construction or maintenance of a public improvement. In the latter case nothing for which an assessment is levied is in the nature of things permanent; streets, sidewalks and sewers wear out and must be replaced; the benefit from street watering is even more transitory, and it would be absurd to contend that the owners of land which had been assessed a part of the cost of constructing a sidewalk, a sewer or a street were constitutionally entitled to have the work replaced over and over again at the public expense whenever its usefulness had come to an end from natural causes. *The legal establishment of a public improvement and especially of such an improvement as a park is in the nature of things permanent; it needs no renewal; it is its expected permanency that leads people to build in proximity to it and gives the increased value upon which the special assessment is based.* The distinction between an assessment for establishing a public work

> and an assessment for construction is recognized and discussed in several Massachusetts cases. The decisions that sustain an assessment for a transitory benefit merely recognize that an improvement which is in its nature transitory may be the subject of a special assessment, and do not intimate that an improvement which is in its nature permanent, and is treated as permanent in fixing the amount of the assessment, may be treated as transitory whenever it suits the convenience of the municipal authorities. It may be that it is here that the true distinction lies and that it is only an assessment for establishment that gives the owner of land assessed a vested right in the continuance of the improvement; but whatever his rights may be, like all other property they can of course be taken by eminent domain upon payment of compensation if the public needs require it."

It will thus be seen that, so far from Mr. Nichols' work on Eminent Domain cited by this Court in its opinion, supporting the proposition aforesaid, it is very clearly explained therein why the contrary rule is deemed to be the sounder and better one.

It must be conceded that no previous decision of this Court has ever maintained that the public authorities may, without payment of compensation to parties previously assessed for betterments, divert to a wholly different use land dedicated to the particular public improvement concerned. It is, accordingly, respectfully submitted

that, if such an absolute and unrestricted right is to be recognized in this case, it should, at least, not be done without an opportunity for full argument on the proposition, both in printed briefs and oral argument. Petitioners advanced no such proposition in their brief, but contended instead (1) that respondents' rights could be obliterated without compensation through the exercise of the police power (pp. 7-17), and (2) that no diversion to a different use would take place by the attempted conversion of that corner of Rock Creek Park into a Municipal Fire Engine House (pp. 17-19). The cases cited in respondents' brief were naturally limited to meeting the propositions advanced by petitioners, and did not undertake to cover the broader proposition aforesaid which counsel on neither side regarded as being here involved. Petitioners, doubtless, felt that it would be futile to urge such broader proposition upon this Court, in view of this Court's refusal, in United States v. River Rogue Co., supra, to sanction the rule that betterments for which assessments are levied are mere "uncertain and contingent 'privileges'" which may be arbitrarily or capriciously destroyed or impaired, this Court re-affirming, instead, the doctrine of property rights laid down as early as 1870 in Yates v. Milwaukee, supra, as contradistinguished from the wholly speculative future rights recognized in Massachusetts and a few other States.

Moreover, it is confidently believed that, upon

full argument, this Court will become convinced that, regardless of its power to change or modify, insofar as *future cases* are concerned, the principles laid down in Yates v. Milwaukee, supra, and United States v. River Rogue Co., supra, it ought not to be, and will not be, disposed to make any change or modification to the prejudice of *past cases*, such as respondents,' any more than this Court felt at liberty (which it did not) to permit the Court of Appeals of New York, in Muhlker v. N. Y. & Harlem R. Co., 197 U. S. 544, to change or modify, to the prejudice of past cases, previous rulings by said New York Court affecting property rights.

The opinion filed herein December 5, 1932, treats as facts (1) that the proposed Municipal Fire-Engine House will divert that portion of Rock Creek Park from park uses, (2) that the presence of such structure will diminish the attractiveness of respondents' lands for residence purposes and, in consequence, decrease their exchange value, (3) that lands, including those now owned by respondents, were assessed for benefits as directed by the Rock Creek Park Act of 1890, which expressly declared the Park to "be perpetually dedicated," and (4) that respondents acquired rights commensurate with the assessments authorized. Such declaration of perpetual dedication was not necessary to the protection of the rights of the parties assessed (and their successors in title) except as an extra precaution to

avoid possible question even under the very strict rule prevailing in Massachusetts (Thayer v. City of Boston, supra). Did Congress take such extra precaution in order to insure the collection of full betterments on the basis of such perpetual dedication, or did Congress intend such declaration to be without any real legal effect? Whatever Congress may have intended, it would seem to be manifest that the assessments were made (in the language of Thayer v. City of Boston, supra) "upon terms and under circumstances which fairly gave those assessed owners who paid them, or subsequent purchasers, the right to understand that they were then being assessed and were paying for nothing less than the *perpetual maintenance* of an adjacent park." It is respectfully submitted that it is now too late, after the lapse of more than 40 years, to entertain the suggestion, for the first time, that the condemnation commission ought to have been instructed by the Court in that case, or that the adjacent property owners ought to have endeavored to have the Court rule, or to have persuaded the condemnation commission, that something less than perpetual establishment of the park was provided for in the Act. While one Congress cannot bind a subsequent Congress as to legislative acts which have not ripened into contracts, it is well settled that one Congress can (equally with a State Legislature) make contracts binding upon the Government and which cannot be obliterated by a sub-

sequent Congress without compensation. Dartmouth College v. Woodward, 4 Wh. 518; Sinking Fund Cases, 99 U. S. 700.

It is respectfully submitted that a re-hearing should be granted in this case, not only in justice to these respondents, but in justice to the Court itself, which ought to have the benefit of full argument from opposing counsel before finally disposing of a proposition of such far-reaching consequences, seriously affecting property owners throughout the United States, and affecting with equal, or greater, seriousness the Government itself in future condemnation cases involving necessarily reduced betterment assessments if such proposition be maintained. It is suggested that a suitable time be fixed for filing of printed briefs in advance of the re-argument, if granted.

Respectfully submitted,

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CERTIFICATE OF COUNSEL.

We hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

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